

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE  
June 19, 2001 Session

**STATE OF TENNESSEE v. DOROTEO APARICIO LAZARO**

**Direct Appeal from the Circuit Court for Bedford County  
No. 14620     Lee Russell, Judge**

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**No. M2000-01650-CCA-R3-CD - Filed September 18, 2001**

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Defendant was convicted by a Bedford County jury of DUI, second offense, Tenn. Code Ann. § 55-10-401, and driving while license revoked, second offense, Tenn. Code Ann. § 55-50-504, both Class A misdemeanors. Following a sentencing hearing, the trial court ordered Defendant to serve a sentence of 11 months, 29 days, with all but 90 days suspended, for the DUI conviction and a sentence of 11 months, 29 days, with all but 60 days suspended, for his conviction of driving while license revoked. The trial court further ordered that the sentences be served consecutively, for an effective sentence of 150 days confinement, and that Defendant pay a total of \$3600 in fines. On appeal, Defendant raises the following issues: (1) whether the trial court erred in allowing the arresting officer to testify concerning the results of Defendant's blood alcohol test without first complying with the requirements set forth in State v. Sensing, 843 S.W.2d 412 (Tenn. 1992); (2) whether the trial court erred by considering Defendant's national origin prior to sentencing; and (3) whether the trial court erred by ordering that Defendant's sentences be served consecutively. After a thorough review of the record, we affirm the judgment of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed.**

THOMAS T. WOODALL, J., delivered the opinion of the court, in which DAVID G. HAYES, J. and TERRY LAFFERTY, Sp.J., joined.

Mario Ramos, Nashville, Tennessee, for the appellant, Doroteo Aparacio Lazaro.

Paul G. Summers, Attorney General and Reporter; John H. Bledsoe, Assistant Attorney General; J. W. Michael McCown, District Attorney General; Michael Randles, Assistant District Attorney General, for the appellee, State of Tennessee.

## **OPINION**

### **Factual Background**

At approximately 8:00 a.m. on September 18, 1999, Officer Charles Kimbrill, of the Shelbyville Police Department, was traveling southbound on North Main Street when he observed Defendant's vehicle traveling in the opposite direction. His radar unit showed that Defendant's vehicle was traveling at 60 miles per hour. The posted speed limit was 40 miles per hour. Kimbrill turned around, switched on his blue lights, and stopped Defendant on Hickory Drive.

Officer Kimbrill approached the driver's side of the van and asked to see Defendant's driver's license. (Defendant spoke only Spanish; he understood no English. Kimbrill claimed to be "semi-fluent" in the Spanish language.) Defendant replied he did not have a license. Kimbrill requested that Defendant exit the vehicle, and Defendant complied. Kimbrill testified at trial that Defendant was unsteady on his feet. In addition, there was the strong odor of beer on his person, his eyes were glassy and bloodshot, his face looked tired, and he had what appeared to be pieces of moist food or vomit on his jacket. Defendant did not appear agitated at the time, and he cooperated fully in answering Kimbrill's questions. Kimbrill asked Defendant whether he had been drinking, and Defendant replied that he drank one beer. Defendant told Kimbrill that he was tired because he had just finished a twelve-hour shift at work, and he was speeding because he did not want to be late to his second job. Based on his experience with intoxicated persons, Kimbrill deduced that Defendant was driving under the influence of an intoxicant and arrested him for DUI and driving without a license. Kimbrill testified that he did not ask Defendant to perform any field sobriety tests because he believed he would be unable to properly translate the procedures so that Defendant would understand them.

When Officer Bobby Peacock arrived to provide backup, Kimbrill was speaking to Defendant in Spanish. Peacock testified that he did not understand what either of them were saying, but he noticed that Defendant was unstable on his feet and a strong odor of alcoholic beverage was emanating from him. Defendant also had red eyes and some type of food or "vomit" on his jacket. Based upon his experience, Peacock believed Defendant to be intoxicated.

After Defendant was arrested and placed in the back of Kimbrill's police car, the officers called for a tow truck. During a search of Defendant's vehicle, they discovered a phone bill with the name "Enrique Doroteo Aparicio" on it. Kimbrill testified that when he showed the bill to Defendant and asked him whether the name on the bill was his, Defendant replied affirmatively and gave his birth date as September 9, 1961. Later, the police discovered this was not Defendant's correct name, and his birth date was actually September 10, 1961.

When Defendant arrived at the police department, Kimbrill asked him to participate in a Breathalyzer test to determine blood alcohol content, and Defendant agreed. Kimbrill explained the procedure in Spanish and demonstrated how to blow into the machine. Defendant placed the tube in his mouth and his cheeks puffed up, but the air he exhaled registered "insufficient" sample.

When it became obvious to Kimbrill that Defendant was not actually blowing air into the machine, he reexplained the procedure and they performed the test two additional times. Defendant still failed to blow sufficient air for a valid reading. Defendant was taken to the jail and booked. Later, Kimbrill learned that the name and birth date on Defendant's arrest report were incorrect. A new check with the correct information revealed that Defendant's driver's license had been revoked. Although Defendant was eligible for reinstatement if he met certain requirements, e.g., proof of insurance, payment of fees, et cetera, he had not satisfied the requirements as of that date.

Defendant testified at his trial through an interpreter. He claimed that on the morning of his arrest, he had just finished working twelve hours, 6:00 p.m. to 6:00 a.m., packing biscuits. When Defendant finished his shift, he went home to eat breakfast and have one beer. The food on his jacket was chicken and gravy which had spilled from his tortilla; he had not had time to change. Defendant slept in his car for an hour before leaving to go to his second job. Defendant owned a restaurant downtown where he also worked as the cook. Defendant admitted to speeding, but claimed that he was in control of his vehicle. Officer Kimbrill confirmed that he stopped Defendant because he was speeding; he did not observe Defendant's vehicle swerving.

During his testimony, Defendant admitted informing Kimbrill that he drank one beer. However, he also asserted that he would have passed field sobriety tests if he had been given any. Defendant denied staggering when he exited his vehicle and claimed that he had complied fully with the officer's instructions for taking the Breathalyzer test. Defendant further denied giving Kimbrill his wrong name and birth date, and he claimed that Kimbrill never showed him a phone bill.

## **Analysis**

### **A. Admissibility of Officer's Testimony**

Defendant contends that the trial court erred when it allowed Officer Kimbrill to testify concerning the results of Defendant's blood alcohol test without first complying with the requirements set forth in State v. Sensing, 843 S.W.2d 412 (Tenn. 1992). We disagree.

As a preliminary matter, we observe that Defendant failed to specifically raise this issue in his motion for new trial as required by Rule 3(e) of Tennessee's Rules of Appellate Procedure. Defendant's motion for new trial alleges that "the [trial] judge admitted evidence which was inadmissible." This claim is too broad, standing alone, to satisfy the specificity requirement in Rule 3(e) and, therefore, is waived. Fahey v. Eldridge, 46 S.W.2d 138, 142-43 (Tenn. 2001).

Even if the issue is not waived, Defendant would not be entitled to relief on the merits. The supreme court's decision in State v. Sensing, 843 S.W.2d 412 (Tenn. 1992), upon which Defendant relies, does not support his claim of error concerning the police officer's testimony regarding test results. In Sensing, the court determined the foundation that must be laid prior to admitting breath alcohol test results into evidence at trial. Id. at 416. In its conclusion, the court stated that because the instruments and procedures used for such tests had become familiar and their use commonplace,

some relaxation of the rigorous prerequisites formerly required to authenticate their reliability was appropriate. *Id.* (pursuant to Sensing, a testing officer is no longer required to know the scientific technology involved in the function of the machine). Here, the record reveals that Defendant gave insufficient samples during Officer Kimbrill's attempts to administer the Breathalyzer test. Thus, the officers never obtained a valid reading. The requirements set forth in Sensing apply only when the State seeks to introduce into evidence the *results* of a Breathalyzer test. Here, there were no results available; therefore, Sensing did not apply.

## **B. Consideration of Defendant's National Origin in Sentencing**

Defendant contends that the trial court erred because it considered Defendant's national origin during sentencing in direct violation of Tenn. Code Ann. § 40-35-102(4). Specifically, Defendant argues that, because questions regarding Defendant's immigration status were allowed prior to the trial court's determination of his sentence, the mind of the court was improperly influenced which resulted in a longer sentence. We disagree.

Defendant is correct that Tennessee Code Annotated section 40-35-102(4) requires a trial court to exclude all considerations respecting race, gender, creed, religion, national origin and social status when determining a defendant's sentence. However, the record does not show that the trial court violated this statutory directive. We may not automatically presume that because the trial court learned of Defendant's status as an "undocumented immigrant" prior to sentencing, it improperly considered this fact in its determination. See State v. Richard T. Smiley, No. 03C01-9707-CR-00305, 1998 WL 692965 at \*3, Blount County (Tenn. Crim. App., Knoxville, October 6, 1998) judgment aff'd, 38 S.W.3d 521 (Tenn. 2001) (mentioning the defendant's gender does not equate with considering it as a factor in sentencing). To the contrary, the record indicates that the trial court recognized the legal restrictions surrounding Defendant's citizen status. When the prosecutor stated its desire to call Defendant for questioning about his immigration status, Defendant objected on the ground that it was irrelevant to the matter of sentencing. The trial court appeared to agree, replying that the information was relevant to the issue of setting an appeal bond and it wanted "to do it all together."

Further, Defendant's brief fails to cite any proof in the record that might indicate the court was influenced by Defendant's undocumented entrance into this country, and our review of the record has not uncovered evidence of prejudice. As a result, we find that the trial court's decision to hear evidence concerning appeal bond issues and sentencing issues at the same hearing was within its discretion. Defendant is not entitled to relief on this issue.

## **C. Consecutive Sentencing**

Defendant also contends that none of the criteria set forth in Tennessee Code Annotated section 40-35-115 apply to his case and, therefore, the trial court erred by ordering Defendant's sentences to be served consecutively. We disagree.

When an accused challenges the length, range, or the manner of service of a sentence, this Court has a duty to conduct a de novo review of the sentence with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d) (1997). The presumption of correctness is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). This means that if the trial court followed the statutory sentencing procedure, made findings of fact that are adequately supported in the record, and gave due consideration and proper weight to the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, we may not disturb the sentence even if a different result were preferred. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). The burden is on the defendant to show that the sentence is improper. Tenn. Code Ann. § 40-35-401(d), Sentencing Commission Comments.

Concerning Defendant's consecutive sentences, Tennessee Code Annotated section 40-35-115 is the statutory authority concerning sentencing determinations for defendants with multiple convictions. Essentially, the statute provides that the court may order sentences to run consecutively if it finds by a preponderance of the evidence that *one or more* of the statutory criteria exists. State v. Black, 924 S.W.2d 912, 917 (Tenn. Crim. App. 1997). Defendant asserts that none of the factors enumerated in section 40-35-115 apply to his case. We disagree.

Initially, we note that at the time of commission of the offenses which are the subject of this appeal, Defendant was on probation for his conviction of first offense driving while license revoked. According to the record, the "greatest concern" of the trial court was Defendant's prior record. The concern appears justified. Defendant's prior criminal record contains two convictions for failure to appear, in addition to the prior convictions for DUI and driving while license revoked which caused his most recent convictions to have "second offense" status. In addition, we note that Defendant was still on probation for his first offense DUI when he was arrested on February 17, 1999, for his first offense of driving while license revoked. The instant convictions represent the second time that Defendant has committed offenses while on probation for prior crimes. In ordering consecutive sentencing, the trial court emphasized it was "clear that some substantial punishment [wa]s going to be necessary to deter him from doing this again."

In sum, we concur with the trial court's determination that consecutive sentencing is proper in Defendant's case. Although we question whether Defendant's record of criminal activity is sufficiently "extensive" to warrant consecutive sentencing, resolution of this issue is not necessary because factor (6), allowing consecutive sentencing based on offenses committed while on probation, clearly applies. See Tenn. Code Ann. § 40-35-115(2), (6) (1997). Since the statute provides that the trial court may order sentences to run consecutively if it finds by a preponderance of the evidence that only one of the statutory criteria exists, the trial court's order imposing consecutive sentences in Defendant's case is justified based on the circumstances presented. Defendant is not entitled to relief on this issue.

### **Conclusion**

For the foregoing reasons, the trial court's judgment is AFFIRMED.

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THOMAS T. WOODALL, JUDGE